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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 55

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

Petitioners.

vs.

AMERICAN OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 971.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

Petitioners,

vs.

AMERICAN OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court is reported at 215 F. Supp. 1. The opinion of the Court of Appeals for the Seventh Circuit is reported at 324 F. 2d 903.

JURISDICTION

There is a defect in the jurisdiction of this Court on the Petition for Certiorari because of the failure of petitioner to comply with the mandatory requirements of Rule 33(1) of this Court. Petitioner served copies of its Petition for Certiorari on counsel for respondent in Hammond, Indiana.

and Chicago, Illinois, by regular mail, rather than air mail as required by the rule, despite the fact that the distance from Washington, D. C., where the Petition for Certiorari was mailed, is greater than 500 miles.

QUESTIONS PRESENTED.

Under a collective bargaining agreement containing a limited arbitration clause, a limited no-strike clause, and a specific exclusion from arbitration of matters not covered in the contract, the Union seeks arbitration of a matter not covered in the contract, and on an issue previously decided adversely to the Union by the Court of Appeals. The issues presented are:

1. Should this Court again review the well-established principles regarding arbitration of labor disputes in a case where the Court of Appeals found that the employer has not agreed to arbitrate a matter within the terms of a specific exclusion clause of a collective bargaining agreement, which also contained a limited arbitration clause and a limited no-strike clause?

2. Should this Court again review the well-established principles regarding arbitration of labor disputes in a case where the Court of Appeals ruled that an employer was not required to arbitrate a particular dispute, because of the application of settled principles of collateral estoppel?

STATUTE AND REGULATION INVOLVED.

The pertinent statute, being Section 301(a) of the Labor-Management Relations Act, is set forth in the Petition for Certiorari at page 2.

In addition, Rule 33(1) of this Court, hereinbefore referred to, provides as follows:

"1. Whenever any pleading, motion, notice, brief

of other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. Where the person on whom service is to be made resides 500 miles or more from the person effecting service, such mailing must be made with air mail postage prepaid."

STATEMENT OF THE CASE.

This is an action like *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), in which the Court of Appeals of the Seventh Circuit ruled that an employer was not required to arbitrate a grievance which it had not agreed to submit to arbitration.

This action was brought by the plaintiff, an incorporated labor union ("Union"), under and by virtue of *Section 301 of the Labor-Management Relations Act of 1947* (29 USC Sec. 185) to require the defendant, *American Oil Company* ("American") to submit to arbitration a complaint that American had breached the collective bargaining agreement in effect between the parties by contracting out crane work to an independent contractor. (Joint App. pp. 4 to 6.) The Court of Appeals held (1) that American was not obligated by the terms of the collective bargaining agreement to submit the grievance in dispute to arbitration, and (2) even if American were so obligated, the plaintiff union was barred from the maintenance of its present action by collateral estoppel. (App. A, p. 33.)

The collateral estoppel was based upon a prior decision by the same court (*Independent Petroleum Workers of America, Inc.* v. *Standard Oil Company*, 275 F. 2d 706 (7th Cir. 1960)) involving the same issue between the same

parties and the same terms of the collective bargaining agreement. In this prior decision, the Court of Appeals had ruled that American had not agreed to arbitrate its right to contract out work. (App. C, pp. 35 to 42.)

On October 17, 1960, American entered into a contract with an independent contractor for the performance of work involving the demolition of certain buildings and oil refining facilities within its Refinery in Whiting, Indiana; using the cranes and operators of the contractor. (Joint App. p. 34.) The Union filed a grievance complaining about the action of the Company in contracting out this crane work. American denied the grievance, whereupon the Union asked that the matter be submitted to arbitration, to which American replied that the issue was not eligible for arbitration under the terms and provisions of the collective bargaining agreement. (Joint App. p. 35.)

On June 2, 1961, the Union filed a complaint seeking to compel arbitration of the issue in the District Court at Hammond, Indiana. After a Rule 12 motion addressed to the Complaint was sustained, the Union filed an Amended Complaint in two paragraphs upon which the case was submitted. (Joint App. pp. 4 to 8.) Issues were formed by Answer in three paragraphs addressed to the Amended Complaint. (Joint App. pp. 24 to 28.)

The Union filed a Motion for Summary Judgment on legal paragraph 1 of its Complaint with Affidavit in support thereof. (Joint App. pp. 20 to 23.) American also filed a Motion for Summary Judgment and Affidavit in support. (Joint App. pp. 28 to 40.)

For many years American had used both its own employees and independent contractors to perform certain work at its Whiting Refinery. (Joint App. p. 32.) In using independent contractors, certain factors were considered by American; among these are the availability of qualified

employees, whether the work involved secret, patented or unique processes or materials, whether American had the equipment to perform the work, whether the contractor guaranteed the quality of the work, economic considerations, previous experience with its own employees in similar work and whether the work was hazardous or disagreeable. (Joint App. p. 31.)

Where practicable, American has used its own employees but for many years American has contracted with independent contractors to perform a wide variety of work, including pipe fabrication, electrical repairs, pipe cleaning, brass foundry work, tool making and others.

Likewise for many years, American has caused crane operating work at its Whiting Refinery to be performed by its own employees and by independent contractors. (Joint App. p. 32.) In the period from 1957 to 1960, inclusive, thirty-one separate contracts for crane work alone were let to independent contractors at the Whiting Refinery. (See List, Joint App. pp. 37 and 38.)

Prior to the year 1950, the collective bargaining agreement between the parties contained a broad arbitration clause which provided that any and all differences between the parties were compulsorily arbitrable. As a result of negotiations between the parties in 1952, an agreement limiting the arbitration clause was reached as expressed in the following language, which has been re-adopted in each of the several collective bargaining agreements reached by the parties since that year and was in effect at all times pertinent herein:

> "Section 10. As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising

from applications, interpretations or alleged violations of the terms of this agreement.

"2. Questions directly involving or arising from applications, interpretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.

"3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:

"(a) the modification by the Company of any of said policies, practices, customs and usages, or

"(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

"(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

"D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (Joint App. pp. 12 and 13.)

This came into being as a result of hard bargaining. The violent objections of the union to the company's proposals to limit the arbitration clause are illustrated by its bulletin to members protesting the proposed change. (Joint App. pp. 39 and 40.)

In addition to the bargaining history on the arbitration clause itself, the record in this case shows that in the years 1955, 1957, 1959 and 1961, the Union attempted to bargain for proposals which would have placed limitations and restrictions on the Company's right to employ independent contractors. Each of these proposals was rejected by American, and the arbitration clause remained the same. (For details of these proposals, see Joint App. pp. 32 to 34.)

On March 13, 1963, the District Court entered an order denying American's Motion for Summary Judgment as to paragraphs I and II of the Amended Complaint and dismissing paragraph II of the Amended Complaint as "moot". The District Court granted the Union's Motion for Summary Judgment on legal paragraph I of its Complaint. (Joint App. p. 43.)

The Court of Appeals reversed the ruling of the District Court and directed the District Court to grant the motion of American for summary judgment on the ground that American had not agreed to arbitrate its right to contract out work; and on the further ground that the prior decision of the court involving the same parties and the same issue precluded the Union from pursuing the instant action because of collateral estoppel. (App. A. pp. 25 to 34.)

The Court of Appeals cited *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) and *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960) and distinguished those cases from the instant case on factual grounds, such as the difference in the scope of the arbitration clause and the difference in the exclusion clause. (App. A. pp. 26 to 28.)

The Court of Appeals also based its unanimous de-

cision upon the application of the doctrine of collateral estoppel. After examining the pleadings, briefs and opinion of the Court of Appeals in the former case (*Independent Petroleum Workers of America, Inc. v. Standard Oil Co.*, 275 F. 2d 706 (7th Cir., 1960)), the Court concluded that the issue presented in the instant case and the prior case were the same and therefore the doctrine of collateral estoppel was applicable. (App. A. pp. 29 to 33.)

ARGUMENT.

It was settled both before and after the decisions of this Court in the cases known as the trilogy that an employer is required to arbitrate only matters which it has agreed to arbitrate under the terms of the collective bargaining agreement. In view of this basic and fundamental rule, respondent believes that it is important to note the following significant elements which are present in this case and will be discussed briefly in the following sections of this brief:

1. The arbitration clause in the agreement under consideration herein states that arbitration will be "limited to" certain designated matters.

2. The arbitration clause in the agreement under consideration herein contained a specific exclusion clause (Subsection D) which provided expressly that the Company would bargain with the Union on matters not covered in the agreement, but that the Company retained the right to refuse to arbitrate such matters and provided that the Union had the right to strike on such issues when the Company declined to arbitrate.

3. The collective bargaining agreement does not contain an absolute no-strike clause, and, therefore, petitioner had a right to strike when respondent refused to arbitrate the issue of contracting out work.

4. The collective bargaining agreement contains no reference whatever to the contracting out of work or the arbitration of the Company's right to contract out work; and since the exclusion clause specifically includes items not covered in the agreement, this issue is expressly within the exclusion clause.

5. The bargaining history between the parties establishes a limitation of the scope of the arbitration clause by the Company during negotiations (over the strenuous objection of the Union); and also establishes a bargaining history of unsuccessful attempts by the Union to limit the right of the Company to contract out work.

6. The arbitration clause in the instant case had previously been construed by the Court of Appeals, and the Court of Appeals had previously held that the Company had not agreed to arbitrate its right to contract out work.

A. There Is No Conflict of Decisions.

The decision of the Court of Appeals in this case is consistent with and does not conflict with any decisions of this Court or any decisions of the Courts of Appeal of other circuits.

In the hope of inducing this Court to again review the well-established rules regarding the arbitrability of disputes between a company and union under particular collective bargaining agreements, petitioner asserts that the decision of the Court of Appeals in this case is squarely in conflict with the decisions of this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and is also in conflict with the decisions of other circuits.

Petitioner then attempts to support this contention by isolating the factual differences between this case and the cases of *United Steelworkers* v. *American Mfg. Co.* and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, and then arguing that each of these differences, as so isolated and treated separately, brings this case within the rule of *Warrior & Gulf* that the employer has agreed to arbitrate the dispute.

Respondent has never contended and does not now contend (nor did the Court of Appeals hold) that any one of the many factual distinctions between this case and *Warrior & Gulf*, considered separately and by itself, was sufficient for the application of the rule that the employer had not agreed to arbitrate a particular dispute. Respondent has contended, still contends, and the Court of Appeals has twice held that the obvious factual differences between this case and *Warrior & Gulf*, such as the limited arbitration clause, the specific exclusion clause, the lack of an absolute no-strike clause, and a bargaining history of limitations of the arbitration clause in bargaining negotiations do bring this case within the rule that the employer has not agreed to arbitrate this grievance.

The fact that the decision in this case is not in conflict with any decisions of this Court is illustrated by the statement of the applicable rule in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960) in the following language:

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

This same rule was reaffirmed by this Court in the later case of *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962) (a case appealed from the Seventh Circuit), in the following language:

> "Under our decisions, whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. 'The Congress * * * has by Sec. 301 of the Labor-Management Relations Act, assigned the courts the

> duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582, 4 L. Ed. 2d 1409, 1417, 80 S. Ct. 1347. See also *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 570, 571, 4 L. Ed. 2d 1403, 1432, 80 S. Ct. 1343, 1363 (Concurring Opinion). We think it unquestionably clear that the contract here involved is not susceptible to a construction that the Company was bound to arbitrate its claim for damages against the Union for breach of the undertaking not to strike."

While it is true that this Court, in deciding the three cases known as the trilogy, has established a rule favoring arbitrability of labor disputes, and also true that the courts, in following this rule, have ordered arbitration in a great majority of cases decided since 1960, it is not true, as counsel for petitioner would have the Court believe, that any case in which arbitration is not ordered is a case squarely in conflict with the decisions of this Court.

In a number of cases where the arbitration clause is limited and the exclusion clause specific and clear, such as the instant case, the courts have followed the rule of this Court that arbitration is a matter of contract and have declined to order arbitration in such cases. *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962); *Local 201, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Co.*, 283 F. 2d 147 (1st Cir. 1960); and *Local 787, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *Collins Radio Co.*, 317 F. 2d 214 (5th Cir. 1963).

Petitioner argues on pages 11 and 12 of its Petition for Certiorari that the Court of Appeals erred in holding, in the instant case, that the Union's argument that a mere

allegation that the agreement was violated, ipso facto, entitles the Union to arbitration was "devoid of all logic." Petitioner argues that the Union's contention is precisely what the court held in the *American Manufacturing* case and cites the language from that case to the effect that "'the function of the court' * * * 'is confined to ascertaining whether the party seeking arbitration is making a claim which *on its face* is governed by the contract.'" (Our emphasis.) Respondent submits that there is a considerable difference in a ruling that a claim "which on its face is governed by the contract" is arbitrable as against a ruling that "any claim" which the Union would "allege" was arbitrable would, automatically and by virtue of such allegation, become arbitrable.

Respondent submits that the specious nature of this argument is further illustrated by the fact that this contention, if accepted by the Court, would require the respondent to arbitrate any and every dispute which plaintiff would "allege" constituted a violation of the collective bargaining agreement. Such an argument would seem to be fallacious on its face because the collective bargaining agreement in this case provides that matters subject to arbitration shall be "limited to" and then goes on to provide the specific matters which would be subject to arbitration and matters which specifically are stated as not subject to arbitration.

Other courts presented with similar contract language allowing arbitration of "alleged" or "claimed" grievances or contract violations have not accepted the argument that arbitrability necessarily and automatically follows from such language.

Thus in *Pacific Northwest Bell Telephone Co. v. Communications Workers of America*, 310 F. 2d 244, 246 (9th Cir. 1962), the court declined to compel arbitration of the

matter in dispute despite the following language in the collective bargaining agreement:

> "The provisions for arbitration shall apply only to controversies. * * * regarding the true intent and meaning of any provision of this contract or regarding a *claim* that either party hereto has not fulfilled a commitment made in this contract." (Our emphasis.)

Also in the case of *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 217 F. Supp. 622, 623 (W. D. Pa. 1963), the court refused to order arbitration of the dispute involved despite the fact that the collective bargaining agreement in that case provided for the arbitration of:

> "(1) The interpretation, application, or *claimed violation* of a provision of this agreement or of a local supplement in effect in the bargaining unit in which the grievance arose, or * * *." (Our emphasis.)

The same contention that mere allegation of a contract violation creates an arbitrable issue has been considered and rejected by other courts. See *Parking Enterprises, Inc.* v. *International Union, Allied Industrial Workers of America, Local 199*, 43 L. C. 25601, par. 17,285 (1961); and *Local 201, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *General Electric Co.*, 262 F. 2d 265 (1st Cir. 1959).

It should also be pointed out that the collective bargaining agreement in this case limits arbitrations to "questions *directly* involving or arising from applications, interpretations, or alleged violations of the terms of this agreement." (Our emphasis.) Since there is no reference whatever in the collective bargaining agreement to the contracting out of work, this issue cannot be one of "the terms of this agreement." Thus, the dispute over contracting out is as indirect, remote, and collateral to the agreement as any dispute could be.

Petitioner argues on page 13 of its Petition for Certiorari that the Court should have ordered arbitration of this grievance under the provisions of subsection (3) of the arbitration clause which provides for arbitration of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." Petitioner makes this argument despite the fact that it admits on page 7 of its Petition for Certiorari that the Union voluntarily abandoned its claim that this grievance was arbitrable under subsection 3 and despite the fact that the record shows (Joint App. p. 43) that the District Court dismissed paragraph II of petitioner's Amended Complaint in this case, which was the paragraph alleging that the present grievance was arbitrable under the provisions of subsection (3) of the arbitration clause.

On page 14 of its Petition for Certiorari, petitioner assails the contention of respondent that this case differs from *American Manufacturing* and *Warrior & Gulf* on the ground that those two cases involved agreements with absolute no-strike clauses, while the agreement in this case permits strikes over matters "not covered in this agreement."[1] Petitioner attacks this contention of respondent by isolating it from all other differences between this case and *American Manufacturing* and *Warrior & Gulf* and then contending that those two decisions are not limited in their applicability to agreements containing absolute no-strike obligations. Petitioner also characterizes this argument of respondent as "totally lacking in merit."

1. The same counsel who characterizes respondent's argument as to the significance of an absolute no-strike clause as "totally lacking in merit" took an entirely different position on the significance of this issue when presenting the trilogy cases to this Court. In his brief filed in those cases, counsel made the following contentions regarding the significance of an absolute no-strike clause:

> "There is no requirement that the terminal point of the grievance procedure be arbitration. In many agreements the union reserves the right to strike if grievances are not resolved.

(Footnote continued on page 16)

Petitioner states in a footnote on page 15 of its Petition for Certiorari that "the only decision of which we are aware that seems to hold that the principles of *American Mfg.* and *Warrior & Gulf* are inapplicable where there is

But the Labor-Management Relations Act of 1947 declared that the most desirable method for the settlement of grievance disputes was arbitration. Where this statutory policy is fully effectuated in a collective bargaining agreement, as in these cases, we have an agreement for a fixed term which sets the standards to be applied in the employment relationship, which provides a grievance procedure in which management's actions in particular cases can be tested, and which provides both an arbitration provision for unresolved grievances and an absolute prohibition of strikes during its term. Such agreements should be enforced in a manner consistent with the legislative policy that all matters in dispute during the term of an agreement should be resolved through arbitration.

"The generous scope which should be given to an agreement to arbitrate grievances is emphasized by two facts. First, if the agreement contains an absolute ban against strikes, it constitutes a complete code governing the employment relationship." (Pet. Brief pp. 20 and 21.)

"It is possible, of course, for the parties to exempt certain subjects from the agreement, preserving their freedom to negotiate, and to strike, over issues on which they cannot reach agreement as to the standard to be applied. This is the practice, for example, in the automobile industry, where the parties deliberately refrain from establishing the standards to govern the critical question of the speed of the production line. This issue is kept as an issue on which the union, after the necessary preliminary negotiations, retains the right to strike even during the term of the agreement.

"The usual practice in American industry, however, is exemplified in the three cases now before this Court. In these cases there is no contemplation of the addition of new provisions to the agreement during the term, or of negotiation with the right to strike on subjects omitted from the agreement. The agreement is intended to govern the total employment relationship." (Pet. Brief p. 36.)

"* * * We contend only that an agreement to arbitrate 'any question of interpretation and application' of a collective bargaining agreement must be construed to mean that whenever either party claims that the agreement has been violated an arbitrable question is presented. This is the only construction which would permit grievance arbitration to perform its function as a substitute for the strike, and as the *quid pro quo* for an absolute agreement not to strike." (Pet. Brief p. 50.)

a right to strike is *Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 217 F. Supp. 622 (W. D. Pa. 1963)." Respondent had never contended and does not now contend that the lack of an absolute no-strike clause makes the principles of *American Mfg.* and *Warrior & Gulf* inapplicable. Respondent does contend that the absence of an absolute no-strike clause is a significant element to be considered by the Court, along with other factors such as the scope of the arbitration clause and the exclusion clause. Other cases which have noted the significance of an absolute no-strike clause are: *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and *Harris Structural Steel Co.* v. *United Steelworkers*, 298 F. 2d 363 (3rd Cir. 1962), Cert. denied 369 U. S. 851 (1962).

B. Collateral Estoppel Is a Proper Basis for the Decision of the Court of Appeals.

On page 17 of its Petition for Certiorari, petitioner states that the Court of Appeals erred in relying upon the doctrine of collateral estoppel in its decision in the instant case. Petitioner lists three reasons for this contention. The specious character of the reasons given is hereinafter indicated by the following answer to each reason.

The first reason of petitioner is as follows:

> "(1) A decision on an issue of law rendered in an earlier suit for breach of contract does not operate as a collateral estoppel in a subsequent suit brought on another contract, even though the language of both contracts may be identical." (Pet. for Cert. p. 17.)

Petitioner attempts to support this first alleged reason with a carefully selected quotation from the decision of this Court in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948)

which appears on pages 21 and 22 of the Petition for Certiorari. Petitioner completes its quotation on page 602 of the *Sunnen* decision; and the next sentence in the decision, which petitioner omits, is as follows:

> "*For income-tax purposes*, what is decided as to one contract is not conclusive as to any other contract which is not then in issue, however similar or identical it may be." (Our emphasis.)

The second reason is as follows:

> "(2) The doctrine of collateral estoppel does not apply where, between the first action and the second one, intervening judicial decisions have rendered the first decision obsolete." (Pet. for Cert. pp. 17 and 18.)

Obviously, petitioner is contending that the decision relied upon by the Court of Appeals for the application of the doctrine of collateral estoppel is no longer the law. It is submitted, however, that the decision of this Court in *Warrior & Gulf* is not inconsistent in any way with the earlier decision of the Court of Appeals in the prior *Independent Petroleum Workers* case. The rule followed by each court is the fundamental rule that an employer cannot be compelled to arbitrate any matter it has not agreed to submit to arbitration.

In *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706, 709, 710 (7th Cir. 1960)[2] the

2. In a footnote on page 5 of its Petition for Certiorari, petitioner infers that the Seventh Circuit has itself abandoned the ruling made in *Independent Petroleum Workers of America* v. *Standard Oil Company* by stating:

> "The Seventh Circuit has since characterized its holding in this case in the following language: 'Until June 20, 1960, when *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, was decided * * * most federal courts, including this Court (*Independent Petroleum Workers of America* v. *Standard Oil Co.*, 275 F. 2d 706) held that management had a right to contract out work * * *.' *International Union, UAW, Local 391* v. *Webster Electric Co.*, 299 F. 2d 195, 196-197 (1962)."

(Footnote continued on page 19)

Court stated the rule in the following language:

> "But since arbitration is voluntary and consensual in nature, warrant therefore must be found within the terms and conditions of the bargaining agreement . . . the defendant had not contracted to refer the issue to arbitration."

In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960), the Court stated the same rule in the following language:

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

The last of the three reasons is as follows:

> "(3) Even if the doctrine of collateral estoppel were applicable in this action, it could not bar the plaintiff's claim under subparagraph 1 of Section 10A of the agreement (providing for arbitration of alleged violations of the agreement), since the earlier action was based solely on subparagraph 3 (providing for arbitration of alleged non-compliance with past practice)." (Pet. for Cert. p. 18.)

When the portions of the paragraph in the decision which were omitted by counsel for the petitioner are included, it is clear that the Court was simply paraphrasing the contentions made by plaintiff and defendant in their briefs. The complete quotation is as follows:

> "We approach the problem presented to us by noting that, until June 20, 1960, when *United Steelworkers of America, AFL-CIO* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 80 S. Ct. 1347; 4 L. Ed. 2d 1409, was decided *according to plaintiff's brief*, most federal courts, including this court (*Independent Petroleum Workers of America* v. *Standard Oil Co.*, 275 F. 2d 706) held that management had a right to contract out work, *and according to defendant's brief, before Steelworkers and since, management has had such right unless it is limited by the terms of the bargaining agreement*." (Our emphasis.)

The portions of the foregoing quotation which are italicized are the portions which petitioner's counsel omitted in the Petition for Certiorari.

This third contention of petitioner is very cogently answered in the decision of the Court of Appeals where the Court, in answer to plaintiff's contention there that the cause of action was different, states that after carefully examining "the briefs, pleadings and opinions of this Court filed in the former case, as well as the briefs and pleadings before us in the instant case" this Court concludes "that plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question." (App. A. pp. 29 and 30)

A further answer to petitioner's contention that collateral estoppel is not applicable because the earlier decision was restricted to Section 10A (3) whereas the later decision was based upon Section 10A (1) is the fact that the decision of the Court of Appeals in the earlier case quotes the entire arbitration clause, including Section 10A (1) and Section 10A (3), and the quotation in the decision is preceded by the following sentence:

> *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706, 707 (7th Cir. 1960).
>
> "Section 10 then imposes limitations on arbitration which, *insofar as here pertinent*, provide:" (Our emphasis.)

In a final effort to induce this Court to again consider the settled rules established in the trilogy, petitioner asserts on page 17 of its Petition for Certiorari that the decision of the Court of Appeals in this case, if permitted to stand, will once again encourage employers to resist arbitration of grievances which are plainly arbitrable. Respondent submits that it is extremely unlikely that any employer would attempt to resist arbitration of a grievance on the authority of a decision based on collateral estoppel.

CONCLUSION.

In conclusion, respondent submits that the Petition for Certiorari should be denied because: (1) There is no issue presented which is significant enough to justify the time of this Court in again reviewing legal principles already established, (2) there is no reason for this Court to review a decision based on collateral estoppel, and (3) there is no conflict between the decision in this case and the decisions of this Court or the Courts of Appeal of other Circuits.

Respectfully submitted,

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